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ABSTRACT

Noting that there are more than 900 advisory committees providing private-sector advice to federal decision makers, this report investigates how well these committees have complied with the 1972 Federal Advisory Committee Act (FACA), which was intended to make them more accessible to the public and reporters. Following an overview of the subject, the first section of the report examines the problems that prompted passage of the FACA, including the practice of some committees to meet in rooms so small that only their members could attend. This section also discusses various provisions of the act and exemptions to it. The second section, reviewing how well the FACA has worked in its first ten years, concludes that it has had limited success in opening meetings to the public and the press. The third section discusses specific violations of the act, especially of its provisions requiring committees to give "timely notice" of meetings, to keep minutes, and to supply the Library of Congress with copies of their reports. The final section discusses the prospects for changes in the FACA and concludes that there is no real interest in reforming the act or in making changes that would strengthen it. (FL)

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THE FEDERAL ADVISORY COMMITTEE ACT AFTER TEN YEARS

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SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
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The Federal Advisory Committee Act After Ten Years

FREEDOM OF INFORMATION CENTER REPORT NO. 474

This report was written by Paul M. Keep, an M.A. graduate of the University of Missouri School of Journalism.

Because of their influence on public policy, federal advisory committees have been called the fifth branch of government — alongside regulatory agencies and the executive, legislative and judicial branches.[1] Last year, 948 advisory committees provided federal government decision-makers with private-sector advice.[2] They ranged in importance from the serious-minded — such as the National Cancer Advisory Board, Advisory Committee for Physics and the Science Advisory Board — to the less-than-earth-shattering — Dance Advisory Panel, Board of Tea Experts and the National Board for the Promotion of Rifle Practice.

The use of advisory committees began during the presidency of George Washington, but it wasn't until after the outbreak of World War II that their use and importance increased dramatically.[3] Advisory committees provide the government regular access to recognized experts who do not work for the government or serve as paid consultants. Committees' recommendations, while not binding, are viewed as helpful by government officials because they provide another perspective on policy questions.

Yet despite the wealth of information on a wide range of subjects generated by such committees, there is little evidence reporters take advantage of this resource. When reporters do seek information, they soon learn advisory committee have, at best, a checkered history when it comes to volunteering information. The 1972 Federal Advisory Committee Act (FACA) was designed to correct such abuses after they were uncovered in congressional hearings. Critics of the committees charged they often operated behind closed doors, seldom informed the public about the time and place of meetings and frequently functioned solely to the benefit of industry representatives. Public interest groups and consumer advocates "saw representatives of big business meeting regularly behind closed doors and turning out reports and recommendatons that were influencing government action against the interest of consumers, small business and other outsiders," wrote Michael H. Cardozo in an **Administrative Law Review** article on the FACA.[4]

One of the FACA's goals was to open up the advisory committee process to greater public scrutiny. But, where the FACA's sister access law, the 1966 Freedom of Information Act, has been used extensively to gain access to government records, the FACA has languished in obscurity. Writing in **Editor & Publisher** less than a year after the FACA became law, Gerald D. Sturges noted that "the more newsworthy the subject, the more likely it is that a meeting will be closed in whole or in part."[5] Since passage of the FACA, 42 percent of all advisory meetings have been either partially or completely closed, according to annual reports submitted to the President.

The public can suffer when those meetings are held behind closed doors. In a 1975 article titled "FOIA and FACA: Freedom of Information," Allan Jonathan Stein wrote:

> Where the impact of a committee is greatest, there is a particular need for public awareness and contribution regarding the nature and substance of that impact. Where the significance of a committee is small relative to the expenditure required for its sustenance, agency responsibility demands an accountability to the public for the expense and effort attendant upon the perpetuation of that committee. In either instance, there are compelling reasons for public awareness of the existence of and functions perform-

Summary

In the first decade since its passage, the FACA has had limited success as the federal government's open meetings law for advisory committees. This paper explores the weaknesses in the act and discusses the prospects for its improvement.

> ed by advisory committees, for public access to the information which is generated therein, and for an opportunity for members of the public to observe, and to have a controlled participatory role in committee processes.[6]

This paper will examine the problems that prompted passage of the FACA and will review how well the law has worked in its first 10 years of existence. The review is undertaken with a focus on FACA's stated goal of opening up the advisory committee process. It is clear that problems remain. Committees still are able to avoid open meetings. Furthermore, because of a lack of interest in FACA reform, changes that would strengthen the law are unlikely in the near future.

AN ACT IS BORN

The early movement toward regulation of the federal advisory committee system focused on better management of committees. In 1842, Congress tried to exert financial control over committees by requiring special appropriations to pay committee expenses. In the 1950s, Justice Department regulations ensured that committees were formed only at the government's request. By 1970, House and Senate subcommittees were investigating the wastefulness of presidential commissions, but concern also was being raised about the openness of advisory committees. The Special Studies Subcommittee of the House Committee on Government Operations issued a report that year titled "The Role and Effectiveness of Federal Advisory Committees." The report made 20 recommendations for the improvement of their operations. The subcommittee's suggestions were adopted by the House and became a key part of the FACA. Perritt and Wilkinson looked at the workings of the FACA two years after its passage and noted that

> although none of the recommendations expressly advised the opening of advisory committee meetings, the bill implicitly dealt with openness in three ways: it continued the requirement that the committees keep minutes of all meetings; it applied the Freedom of Information Act to all records prepared by or made available to committees; and it required committees to give public notice of time and place of all meetings.[7]

In an effort to prevent adoption of the FACA, the White House Office of Management and Budget issued an executive order aimed at improving the supervision of the committees. But Congress was dissatisfied with the White House effort.

Committees were found to be creative in concocting ways to exlude the public from their meetings. "It was, for example, an occasional pre-FACA agency technique to select a room sufficiently small, or otherwise inadequate, to preclude anyone but a committee's members from attendance, thus effecting a kind of de facto exclusion of even public observers," Stein wrote.[8] Because comprehensive records were not kept prior to the FACA's passage, it is impossible to know the extent to which committee meetings were closed. It is safe to assume, though, that committees felt no legal compunction when closing meetings.

The FACA, sponsored by Sen. Lee Metcalf, D-Mont., "resulted from several years of deliberations and ultimate legislative compromise, with FACA reflecting concerns both of improving management and of increasing openness."[9] The act broadly defined an advisory committee as any committee which is "a) established by statute or reorganization plan, or b) established or utilized by the President, or c) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. . . ."[10]

The act excluded from its provisions any committee made up completely of federal employees, the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement and any committees used by the CIA and the Federal Reserve System. The act applies only to the executive branch, thus excluding congressional committees and meetings at which private individuals give advice to members of Congress.

The key provision of the act is its prohibition of secrecy in the operation of advisory committees. Perritt and Wilkinson noted that "the legislative history reveals that Congress intended the FACA to address a major issue: whether deliberations of advisory committees used by the federal government should be open to the public."[11] The act said the "Congress and the public should be kept informed with respect to the number, purpose, membership, activities and cost of advisory committees."[12] Stein reported that Sen. Charles Percy, R-Ill., said it was the intention of Congress that its "standard of openness and public inspection of advisory committee records is to be liberally construed."[13]

The act is straightforward. Section 10 states that "each advisory committee meeting shall be open to the public. . . . Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to reasonable rules or regulations as the (OMB) director may prescribe."[14]

The open-meeting section of the act requires that committee records, transcripts, minutes, working papers, drafts, studies or other documents used by the committee be made available for public inspection until the committee no longer exists. Timely notice of meetings must be given in the Federal Register and detailed minutes — including "a record of the persons present, a complete and accurate description of matters discussed and conclusions reached" — must be kept.[15]

As often is the case with such sweeping legislation, exemptions limiting the law's applicability were included in the FACA. Complete openness and public access to committee meetings was not the act's intent. Most observers of committees agree "some processes function better and serve the public interest better when carried on in private. Determining which processes should be open to public scrutiny and which should be closed is difficult, for the determination rests on a delicate balance of interests."[16]

Congress incorporated the exemptions of the Freedom of Information Act into the FACA because that "act resulted from comprehensive congressional scrutny and balancing

of the need for public disclosure and the need to protect certain information and because the use of the act's exemptions met most of the objections to openness raised during the (congressional) hearings."[17] As a result, the portions of meetings dealing with the following nine areas were exempt from the FACA's open-meeting requirement: material classified because of national defense or foreign policy concerns, personnel policy in an agency, material exempted from disclosure by other statutes, commercial or financial trade secrets, inter- or intra-agency memoranda, personnel and medical files, investigative records compiled for law enforcement purposes, reports of agencies which regulate financial institutions, and geological information.

Problems with the exemptions soon became apparent. The overriding one was that the FOIA exemptions applied to documents, while the FACA applied to meetings. The exemptions for one did not always mesh with the purposes of the other. A congressional conference report noted that "some agencies (using the FOIA exemptions) have closed advisory committee meetings not contemplated by Congress."[18]

The exemption for inter- or intra-agency memoranda proved particularly controversial and was challenged in court. A federal court of appeals upheld the exemption, noting that "the exemption is designed to encourage a free and candid exchange of ideas during the process of decision-making and to prevent predecisional disclosure of incipient policy or decisions that could disrupt agency procedures."[19] The court indicated it found no evidence the exemption was being abused.

Stein saw an inherent conflict between the FACA and the inter- or intra-agency memorandum exemption. He wrote:

> The FACA pushes in the direction of physical openness of committee processes to the public, while (the exemption) is pushing toward closure and isolation. The FACA requires nominal opportunity for public observation and presentation, yet it carves out a swallowing exemption which may render these opportunities hollow. . . . The other exemptions do not necessarily tend to deter that very openness which the FACA seeks to foster.[20]

In the end, it was the discrepancy between documents and meetings that prompted congressional action replacing the FOIA exemptions with those of the Government in the Sunshine Act, which took effect 1977. Perritt and Wilkinson suggested that the emphasis on open meetings, rather than on access to documents, increased the role of the public in the decision-making process. They wrote:

> Oral deliberations usually precede the preparation of documents setting forth decisional alternatives or the decision itself. Those participating in the deliberations are likely to be less precise and less careful in their statements than those who subsequently compose the documents, but the process of deliberation is closer to the core of decision-making than are the documents. Thus, access to deliberations is of a higher order than access to documents.[21]

Aside from their different focuses, seven of the 10 Sunshine Act exemptions correspond to FOIA exemptions. The Sunshine Act does not exempt meetings discussing inter- or intra-agency memoranda, but does exempt portions of meetings that deal with three areas not covered by the FOIA exemptions: accusation of a crime, certain types of premature disclosure of information, and agency lititgation — including subpoenas. Perritt and Wilkinson noted that "while proponents (of open meetings) conceded that the right to know is not absolute and sometimes must yield to the need to protect national security or an individual's privacy, they argued that exceptions to a rule requiring meetings to be open must be narrow."[22]

In addition to the open-meeting section of the FACA, the law made other changes in the advisory committee system. Congress was made responsible for the oversight of committees. The President must prepare an annual report to Congress on committees. The Library of Congress must maintain a depository of committee reports and papers. A Committee Management Secretariat, first under the auspices of OMB but later transferred to the General Services Administration, was created to monitor committee activity for the President.

THE FACA: TEN YEARS LATER

Just two years after the FACA became law, **Access Reports** concluded the act was "more ignored than implemented." The same can be said now, after the law's first decade.[23] Critics of the act argue that while the goals of the FACA are sound, its langugage is ambiguous — "ranging from simple lack of clarity, to the absence of requirements, to lack of sanctions for noncompliance."[24]

The act's provisions for openness have not been the only cause of controversy. In their 1977 article titled "The Federal Advisory Committee System : An Assessment," Kit Gage and Samuel Epstein point to some of the act's other pitfalls. The act calls for balanced representation on committees, but fails to define "balance." Gage and Epstein illustrate the problem:

> (M)ust a committee be divided evenly by interest sectors or is one member, with a viewpoint differing from the majority, sufficient to balance a committee? In implementing the act, federal agencies have generally skirted the issue of representation of opposing viewpoints, concentrating only on the less controversial factors (in this context) of geography, race, and sex as the overriding indicators of balance.[25]

The result is that the Interior Department's National Petroleum Council is considered balanced because its members represent a cross section of the major oil companies. Consumer groups have unsuccessfully challenged that definition of balance.

Another problem has revolved around charges of conflicts of interest by members of committees. Experts in a particular field may be dependent upon government or industry contracts or grants even though the act requires that committee members not be influenced by the agency that appointed them. As Gage and Epstein explained:

> It is not necessary to forbid conflicts, so much as to mandate disclosure of interests. If interests remain hidden, then it is impossible to properly balance a committee with respect to views represented or determine if special interests are disproportionately represented. An expert working at a university, for example, who has been funded by industry grants may well come to conclusions unfavorable to that industry, but it is also likely that the expert would make sure that his or her actions and advice would not jeopardize continuation of these sources of funding.[26]

In 1975, a Ralph Nader group, the Freedom of Information Clearinghouse, advocated changes in the FACA. The group pushed for an amendment that would have assigned oversight responsibility to an independent agency rather than the OMB, added sanctions for violations, and spelled out a definition of balanced membership. The Clearinghouse also called for a better way to challenge closed meetings, improve the availablity of verbatim transcripts of such meetings, and require 30-day advance public notice of all non-emergency meetings.

The realm of access to committee meetings and records has been the biggest disappointment of the FACA — especially to reporters. The chart on page eight of this report shows, among other things, the extent to which advisory committees have conducted their meetings in the open. The chart was compiled from information in the President's annual reports to Congress from 1972 to 1982. On the bright side, it reveals that only 21 percent of all meetings have been closed completely since the FACA became law. However, of the 36,229 meetings held since 1972, fully 42 percent either have been partially or totally closed to the public and press. The worst year was 1975, when almost half — 48 percent — either were closed entirely or in part. The best year was 1980, when only 38 percent of meetings were at least partially closed. In 1982, the figure was 43 percent.

The practice of different agencies varied widely, and somewhat unexpectedly. Not surprisingly, the Department of Defense was one of the most frequent closers of meetings — only 17 percent of its 311 committee meetings were conducted in public in 1981, the last year for which statistics were available.

But even an innocuous sounding agency like the National Endowment for the Humanities succeeded in completely closing 93 percent of its committee meetings, principally because members were discussing applications for grants. The National Endowment for the Arts completely opened only 7 percent of its 103 meetings. On the other hand, the Agriculture Department held 99 percent of its committee meetings in public, and the Interior Department and the Commission on Civil Rights conducted all of their meetings in the open. Even the National Aeronautics and Space Administration, which sometimes deals with sensitive information, managed to hold 84 percent of its committee meetings in public.

Before closing any part of an advisory committee meeting, an agency head must determine whether one of the Sunshine Act exemptions applies to the probable topic of the meeting. The FACA requires an annual report from each committee that closes any part of its meetings. The report should note the exemptions cited and summarize the committee's activities while behind closed doors. A notice of availability of these annual reports must be published in the Federal Register.

"In many cases a lot of these committees are involved in recommending on parts of agency business, proposed rulemaking before it gets to the public stage, and the closure provision for that is invoked," said Charles F. Howton, an analyst for the Committee Management Secretariat, which oversees the operations of advisory committees. "Your State and Defense agencies are going to invoke national security quite frequently because they are dealing with classified information. The financial agencies come under the Sunshine provision for proprietary information."[27]

While recognizing that some committee meetings need to be closed, Perritt and Wilkinson argued there are specific disadvantages to the public when meetings are closed arbitrarily. They wrote that closed meetings may lead to biased recommendations and could prevent the consideration of valuable advice. They also noted that in closed meetings

> committee members obtain knowledge of proposed government actions that nonparticipants cannot share. Permitting committee members to obtain such knowledge and to participate in the decison-making process may harm the interests of nonparticipants in two ways: it may give business or financial interests represented on the committee a competitive advantage over others, and it may force nonparticipants into the position of having to attempt to convince the agency to change a decision, often within a short time.[28]

A major deficiency in the FACA is the lack of a mechanism for second-guessing an agency head's decision to close a meeting. The head of the Committee Management Secretariat does not view such questioning as part of that body's proper role.

"We don't judge the openness or closure of meetings," Howton said. "We don't conduct meetings, we don't even attend them. So if an agency makes a legal determination that those meetings should be closed or partially closed under the Government in the Sunshine Act exemptions, that's the legal determination they should have in place and they can proceed accordingly."[29]

Even if the Secretariat did intervene, it would be difficult to prove an agency was violating the law. "Since the area is so obscure anyway, it's hard to pin down an instance where the government is operating in obvious bad faith or flagrantly not complying with the statute," said Eric Glitzenstein, an attorney for the Freedom of Information Clearinghouse.[30]

The FACA provides the public with no administrative appeal process to challenge the validity of meeting closures. More importantly to legal scholars, the FACA specifies no judicial avenue of appeal. Stein noted this may be a reason the FOIA has met with more success than the FACA:

> An important innovation of the FOIA over its Administrative Procedure Act predecessor was the provision of a judicial remedy for redress of wrongful agency decisions to withhold. The FOIA's judicial remedy is express. There is, however, no express judicial remedy under the FACA for the wrongful denial of access to committee meetings. . . . The value and necessity of having a recourse to the courts in this area of administrative disclosure and openness cannot be denied. The judicial remedy has been the salvation of the FOIA. . . . A recourse to the courts for contested agency decisions respecting nondisclosure and meeting closure under the FACA is no less vital.[31]

Of course, an individual can sue even without an express right to do so. Howton said this should not be one's initial response to problems under the FACA. "You could always petition the head of the agency first. Whether or not your petition is addressed before the event occurs is another question," he said. "If you feel that you want redress, then you're going to have to go to court, because the agency has made the legal determination and stands by it."[32]

But even a judicial remedy would have only limited effectiveness if the goal is to fully open up the process. "If a citizen has been excluded from a meeting, no court order can reconstruct the meeting to permit him to attend, even if the court determines that his exclusion was wrongful," wrote Perritt and Wilkinson.[33] One answer to this dilemma, they noted, could be an administrative appeal process that would swiftly challenge the closing of meetings:

> Provision for such appeal would be desirable because it would afford the agency an opportunity to correct an improper finding before the process of judicial review begins and also would spare citizens the expense and inconvenience of filing lawsuits to vindicate their right to attend most advisory committee meetings.[34]

In his 1981 article, Cardozo concluded the "circumstances that warrant the closings of meetings from public attendance need re-examination and some clarification. . . . Additional administrative guidelines, drafted in the spirit of the FACA, would remove some of the uncertainty as to the justification for declaring meetings closed."[35]

If the FACA is to have its intended effect on opening up the advisory committee process, Stein said, the law must be amended:

> The FACA creates rights without clear remedies. If the judicial remedies do exist, their contours are unclear. If they do not meaningfully exist, the complainant seeking enforcement of a FACA provision is left to the will and whim of agency discretion, subject only to such checks and constraints as may be provided by OMB and Congressional oversight. This intolerable situation deprives the FACA of coherence as a mandate for change in the processes of agency advisory committees.[36]

VIOLATIONS OF THE FACA

Although Cardozo concluded the "overwhelming majority of advisory committees are operating strictly in accordance with the FACA," violations have been recorded. The violations touch on almost every part of the law's open-meeting section — including open meetings themselves, the timely notice provision, the requirement to keep minutes, and the archival function of the Library of Congress.

Gage and Epstein reported several instances where advisory committee meetings were effectively closed through the use of questionable means. For example, the Standards Advisory Committee on Coke Oven Emissions of the Department of Labor conducted a fact-finding trip that was declared exempt from FACA provisions "even though it was a paid gathering of the entire committee for the purpose of fact-finding prior to making recommendations."[37] In other instances, government tactics were more subtle but no less effective:

> An 'open' meeting was held in the Old Executive Office Building next to the White House. Attendance was made very difficult by the tight security measures and after a few hours this 'open' meeting was closed — without prior notice. Another such example is afforded by the Bureau of Land Management (BLM) which announced an open meeting of the advisory board as a field trip to observe lands acquired by BLM in which members of the public were 'required to furnish their own transportation.'[38]

The violation of the FACA's timely notice requirement also has been a persistent problem. Indeed, Cardozo has written that the "failure to give notice of a meeting is about as effective a means of excluding the public as locking the doors."[39] While the act fails to define "timely notice," an OMB circular required that committee meetings have at least a 15-day notice published in the Federal Register. Six months after the passage of the FACA, its sponsor complained that some notices were appearing one or two days prior to a meeting and failed to state the time, place, or purpose of the meeting.[40] Gage and Epstein reported that for July 1974, nearly half — 47 percent — of the Register notices violated the 15-day requirement; by December, the figure had dropped to 9 percent.[41]

In addition, not all committees fully comply with the pro-

vision requiring the keeping of detailed minutes. Gage and Epstein found

> inconsistent practices in keeping minutes. Some advisory committees already keep good, detailed minutes (supplemented by transcripts or tapes); others supply minimal minutes. An available transcript or tape would allow government and public access to the total range of advice given by the committee. Minutes of committee meetings closed for reasons of national security should be kept by the agency to whom the committee reports.[42]

Marblestone noted that although the Sunshine Act calls for a complete transcript or recording of closed meetings, "the history of the Sunshine Act contains no suggestion that the transcript requirement would extend to advisory committee meetings."[43]

Advisory committees also appear to practice wholesale disregard for the FACA record-keeping mission given the Library of Congress. The act requires that at least eight copies of committee reports plus background papers prepared by consultants be filed with the Library — which is directed to make them available to the public. Writing in a publication for librarians, Joe Morehead said in 1975, "it is apparent that compliance with legislative intent and, from the librarian's standpoint, access, control and distribution of the written records of advisory groups, is less than satisfactory."[44]

But Gage and Epstein have noted the Library has been negligent as well:

> Approximately one quarter of the charters of federal advisory committees listed in the (President's) second annual report are not on file at the Library. Indeed, until complaints were lodged, there was no regular file at the Library but only a large cardboard box for storage of all advisory committee material. The Congressional Research Service, the research branch of the Library, is given the option to keep topical advisory committee reports; otherwise the Library generally discards them. No attempt is made by the Library to see that the collection of charters is complete or up-to-date and similarly, the reports are merely channeled through the Library, not cataloged or made publicly available.[45]

Howton of the Committee Management Secretariat said poor record-keeping is inevitable. "The Library of Congress has no way of knowing whether it has something it should or not," he explained. "They, like us, are small-staffed, so there's never been an auditing procedure to ensure that everything is accounted for. You'd have to have a massive tracking system and logging system and, frankly, the personnel resources have not been provided."[46] Howton added the best way to obtain advisory committee reports is to go directly to the sponsoring agency.

A different problem arises when a committee argues it is exempt from the FACA's open-meeting requirement because it is not an advisory committee as defined by the act. Under the cloak of ambiguity, several committees have been able to conceal their activities.

Gage and Epstein noted that "despite the act's seemingly broad coverage, there remain numerous committees which claim exemption or are exempted by statute from the act and consequently do not announce their meetings, do not open them to the public, and do not keep detailed minutes available to the public."[47] They reported the Environmental Protection Agency created "study" or "investigative" panels of its Science Advisory Board and claimed the panels were not subject to the FACA. The panels' working papers — which were used by advisory committees — therefore were withheld from the public, even though the FACA states working papers prepared for advisory committees should be available to the public.[48]

In another example, Gage and Epstein pointed to the National Academy of Sciences, whose charter calls it the official scientific advisory body to the government. The applicability of the FACA to NAS meetings has been a matter of dispute. The Justice Department has ruled the NAS is exempt from the act, a position supported by the courts. In the late 1970s, NAS began to ease restrictions on public access by opening some meetings, but "even under the new NAS guidelines, executive and working meetings of the committees still will not normally be open to the public and notice of meetings will not appear in the Federal Register."[49] Gage and Epstein illustrate the problems that can result:

> In a decision regarding the percentage of lead to be allowed in paint, the Consumer Product Safety Commission received conflicting recommendations. One suggestion from (Department of Health, Education and Welfare) would have set maximum levels of 0.06 percent lead in paint, but another recommendation from an ad hoc advisory committee of the NAS would have allowed up to 0.5 percent lead in paint. The Commission decided to accept the Academy study as the preferred level. . . . With its closed meetings, it is impossible to determine what induced the NAS to make its recommendations. Some of the resultant furor might have been avoided or brought in at an earlier state of decison-making had the proceedings of the advisory committee meetings been open to the public.[50]

Not all advisory committees try to skirt the FACA's provisions: "Important attempts of several advisory committees to hold open meetings, even on some fairly sensitive issues, have lent credence to the movement for wider standards in open meetings."[51] Gage and Epstein wrote that the trend has encouraged greater thoughtfulness on the part of com-

mittee members while not inhibiting freedom of expression. They point to the Food and Drug Administration's Toxicology Advisory Committee, "which remained open at the behest of the public through a complicated and unresolved discussion of the problem of Red Dye No. 2."[52]

PROSPECTS FOR CHANGES IN THE FACA

Despite numerous problems with the implementation of the act, it is unlikely the FACA will be amended soon to strengthen its provisions. Since its passage in 1972, the FACA has been amended only once — to replace the FOIA exemptions with those of the Sunshine Act.

Several other amendments that would have strengthened the access portions of the act have been proposed, but all have died. One would have required a complete audio recording of every closed meeting to be sent to the Library of Congress within 24 hours of the end of the meeting. Another proposal contained "elaborate provisions for making and reporting agency determinations to close meetings, with a detailed grant of jurisdiction to U.S. district courts to hear complaints in camera about plans to hold closed meetings."[53]

Although the Freedom of Information Clearinghouse suggested in 1975 that sanctions be added to the act, Glitzenstein is unconvinced they would work. "It's hard to imagine what kind of sanctions would be effective or who you would even sanction," he said. "You couldn't sanction anyone in the private sector for giving their advice to the government. There might be pretty severe First Amendment problems with that. Sanctioning the government would be extremely unwieldy."[54]

Glitzenstein believes the best check on government secrecy is a vigilant population. Because most advisory committees are "focusing on such narrow areas, 99 percent of the public isn't going to care," he said. "Only when you have someone who's going to make an issue out of it, then is there some chance that the statute is even going to be applied. Nothing is given to you for free in terms of information access. You always have to fight for it."[55]

Howton of the Committee Management Secretariat agreed that amendments to the FACA are unlikely. "I don't think it's an agenda item that's on anybody's calendar right now," he said. "The executive branch is not interested in fully opening it up nor is there pressure in Congress to do so. I think there's general agreement across-the-board that the act is good, that it basically works well and that problems that come up can be resolved on a case-by-case basis as opposed to a broad change in the act's language."[56]

Stein summed up the balance of interests that lies at the heart of the FACA, amended or not:

> If there is a feeling on the part of some agencies that advisory bodies may best advise in the secrecy and anonymity of a 'tinted fishbowl,' then this feeling must be weighed against a history of advisory committee abuses, and a clear Congressional belief that those abuses would be tempered by the allowance of public observation and presentation. . . . The federal advisory committee system can indeed provide a kind of mutual security, both as an agency buffer for adverse public criticism, and as an instrument of public access to an otherwise awesome, and often bewildering bureaucracy. Disclosure and openness, however, are the inseparable safeguards of this mutuality.[57]

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8. Stein, p. 38.
9. Smith, p. 2.
10. The Federal Advisory Committee Act, Public Law 92-463, section 3(2).
11. Perritt, p. 736.
12. FACA, section 2(b)(5).
13. Stein, p. 42.
14. FACA, section 10 (a)(1) and (a)(3).
15. FACA, section 10 (a)(2) and (a)(c).
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49. Gage, p. 50008.
50. Gage, p. 50008.
51. Gage, p. 50008.
52. Gage, p. 50008.
53. Cardozo, p. 50.
54. Glitzenstein interview.
55. Glitzenstein interview.
56. Howton interview.
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ADVISORY COMMITTEE MEETINGS

Calendar Year	Number of Committees	Number of Open Meetings	Number of Closed Meetings	Number of Partly Closed Meetings	Total Annual Cost	Total Number Of Committee Members
1982	948	1,898 (57%)	749	705	—	19,333
1981	853	2,022 (58%)	746	691	$80,102,083	22,198
1980	865	2,539 (62%)	768	767	$87,356,491	21,461
1979	820	2,500 (59%)	936	768	$88,086,974	20,460
1978	816	2,479 (60%)	900	767	$68,405,002	22,348
1977	875	2,677 (60%)	941	877	$64.932,210	24,678
1976	1,159	2,779 (59%)	845	1,070	$59,726,365	27,432
1975	1,267	2,164 (52%)	836	1,179	$51,769,400	25,630
1974	1,242	1,994 (55%)	719	913	$42,380,636	22,702
1973	1,250	—	—	—	$31,110,810	—
1972	1,439	—	—	—	$25,215,882	—

Note: No figure for the total annual cost of advisory committees was available for 1982 at the time this report was written. The Presidential reports did not begin to give information on whether a meeting was open or closed until 1974.

Source: Annual Reports prepared by the President for Congress, 1972 to 1982.

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